No. 870

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY AND A. G. KERNS, Administrator of the Estate of JAMES CLARK, Deceased,
Appellants,

vs.

THE BUFFALO HUMP MINING COMPANY (a Corporation), AND THE EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY (a Corporation),
Appellees.

APPELLANTS' REPLY BRIEF.

Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

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Appellees.

Appellants' Reply Brief.

At the latter part of page 21 and the first part of page 22, also the latter part of page 30 and pages 31, 32, 33 and 34 of appellees' brief, they attempt to show that the Ella and Missing Link, on the 13th day of October, 1899, when they were sold, were not worth more than four thousand dollars, the amount paid for them by the Buffalo Hump Mining Company. It is contended by them that any value that the property had was the result of subsequent development. It is then urged by appellees that a large amount of the testimony which

pertained to subsequent development, showing the size of the drifts, stopes and voids generally within the Ella should be stricken, because it was irrelevant and immaterial. As to whether the Ella and Missing Link have the value which we contend for them at the time of the sale, is a question upon which there is some conflict of testimony. We submit that it was within the power of the appellees to have proven beyond question of doubt the size of the ore body at any and all places within the property by testimony of the most indisputable character, viz., their own records It certainly will not be contended that a mining company, the value of whose property depends upon the size and value of the ore body, has not a record of every foot of the vein, showing the size and values. As to whether or not there was clean ore struck by the drill and by the crosscut, were questions of the utmost importance. Wright, the drillman, one of appellees' witnesses, said six feet of good concentrating ore was struck by the drill. Stone, a witness for the appellees, testified that only six inches of good ore was found in the crosscut. Our witnesses, Mr. Thomas Jay, Mr. Amos Jay, Mr. Macdonald, Mr. Ralston, Mr. Porter and Mr. Harvey, testified to four feet of clean ore at the point struck by the drill hole. And Mr. Tom Jay, Mr. Amos Jay, and Mr. Joseph Macdonald testified to five feet of clean ore in the crosscut, and all testified to a large amount of concentrating ore beside the clean ore in both places. Although the appellees had possession of the mine ever since October 13th, 1899, and even before that, they have seen fit since the commencement of this litigation, to remove all of the ore not only at the point where the drill penetrated

it, but for several levels above it and for an indefinite distance in both directions from it longitudinally. They did the same thing in the crosscut, leaving standing only a small slab of barren rock that they found somewhere in the floor of the crosscut, which they left standing there for reasons that will be apparent to the Court. Appellees not only suppressed their records, which it must be concluded that they have, showing the size of the ore body and the assay values within the Ella and Missing Link, but they suppressed and refused to produce upon the trial, the "Progress Map" and the testimony of the great number of witnesses who worked in the mine, and who have been in their employ, all of whom would have shown conclusively the exact size of the ore body at both places. We had no accurate, conclusive proof such as they had, and therefore we were driven to making such proof as was within our power. We made our proof by men who worked in the mine; by Mr. Macdonald, who was present when the ore was struck in the drill hole, and this is denied by the appellees, yet they failed to come forward with that proof which they had in their possession and which must have been absolutely accurate, and furnish the Court any evidence upon the subject except of the most unsatisfactory character. We contend that there has been no time in the history of the development of the Ella and Missing Link that they promised so much, as on the 13th day of October, 1899 (the day when it is charged that appellees made the false and fraudulent representations). The witnesses all have testified, and the scale, if put upon the map (plan and cross-sections of lower levels, Defendants' Exhibit No. 14, Section A, page 1294, volume IV, Trans.),

will show that the drift and the ore are wider at the place struck by drill hole No. 2, than at any other place in the east drift. It will also show by putting a scale upon the crosscut, that on the 13th day of October, 1899, there was exposed and revealed an equally large body of ore at that point. If we show by the size of the stopes and the drifts that they are from ten to twelve feet in width for a considerable distance, both vertically and longitudinally from the drill hole and the crosscut, and that at the point of the drill hole and the crosscut, the voids are of the same width, perhaps wider, is the argument from that not conclusive that there was ore taken from these drifts and stopes of the width that we find the voids, and is it not equally conclusive that the ore was of the same width at the point of the crosscut and drill hole? These voids and openings speak for themselves, we think. Appellees, however, contend that an opening fifteen or twenty feet wide is made under ground for the purpose of *convenient mining*, but our evidence has shown, and they have not contradicted it, that a drift *six feet in width is sufficiently large for all purposes of convenient mining.* Their position is absurd. Think of it! Blasting, mining, tearing down, breaking up and hoisting twelve hundred feet to the surface—a greater quantity of barren rock than pay ore. For what purpose, pray? The only answer we have is, for convenience. It must be remembered that there was no back filling in this mine. Everything was hoisted to the surface. Appellees claim that there was no clean ore found in the Ella; that none was struck either by the drill or the crosscut. We have shown by our witnesses that for a distance of more than one hundred

feet westerly from the drill hole, and continuing even easterly from it, a nice body of clean ore averaging about four feet was found by the miners. This was the best character of evidence, the highest order of evidence that it was in our power to produce and we think it competent and material to prove the size of the ore body at the point where the drill and crosscut struck it.

A large amount of space is occupied by appellees in their brief to show that the ore on the eight hundred, where Mr. Clark quit work, was as good as ore found further down in the mine, and should have put him upon his guard, and that, therefore, Mr. Clark should not be heard to say that he had been misled by the false and fraudulent statements made to him by Mr. Sweeney. In other words, that he had no right to believe Mr. Sweeney. But this dogmatic statement, untrue in law, we think, is made and entirely unsupported by any citation of authorities whatsoever. The authorities cited by us upon this subject from most of the courts of the country to the effect that it does not lie in the mouth of a man who has deceived another, to say to him, "You ought not to have believed or trusted me," or, "You were yourself guilty of negligence," are unanswered either by contrary authorities or by any attempted argument showing their inapplicability. We addressed ourselves in our opening brief to this proposition, and will again call the Court's attention to the argument which we made, beginning at page 92, and continuing to and including page 101 of our opening brief. If we may be permitted, we will, in addition to the argument there made call the Court's attention to the testimony of Mr. Miller at page 726, volume II of the Transcript, as follows: About the

middle of the answer to the interrogatory, "By Mr. Stoll. Where are they?" he said: "The width of that ore, of the ore seam proper, above the *1100 level, up to and including the 800,* as broken day by day, is two feet." And again, at the top of page 727, he said: "A. A portion of each, No. 2 and No. 3, being in the Ella ground. *Below the 1100 level the ore that is broken and goes to the mill, will average about 4 1-2 to 5 feet in width, and I think that is the best way to get at the average conditions of the ore in that ground to-day.*" It seems to us that this is a complete answer to all that they have had to say upon this subject.

It is stated at pages 26 and 27 of appellees' brief that the books of the Poorman Company that were brought into court by Mr. Clark showed that $16,524.78 net for ores taken from that ground had been paid to appellants by the Poorman Company. Those books did not show that. On the contrary, they showed but a payment of $6,661.70 to appellants. (See page 561, volume II, Trans.) Any other sums paid were paid *by the smelter company.*

At the latter end of page 34 of appellees' brief, we think they state a very strange proposition. "In order to establish the contention of plaintiffs that they sold, on the representation of Sweeney and Culbertson, or either of them, as to the value of the property, it is necessary that they should have sold for the price and value fixed by Sweeney or Culbertson. The very fact that they entered into a contention with Sweeney in regard to the value is conclusive proof that they had, or thought they had, information sufficient to enable them to fix a price upon the property, independent of Sweeney or Culbert-

son, and that they were on inquiry as to value." Counsel cites no authorities in support of this proposition, and we assert with much confidence that none can be found to support it. We stated in our opening brief that the property was not sold as a mine, not even as a prospect. Mr. Sweeney stated that it was not worth fifteen dollars *for the mineral that was in it*, but it had other value. Mr. Sweeney looked upon it as a thing of value to his company *as a way*, connecting the Poorman and O'Neill, *and for surface rights*. Mr. Sweeney paid $3,000 to Mr. Clark on the same day for a one-half interest in the Sheridan, simply for the surface rights. That is proportionately a higher price than was paid for the Ella and Missing Link.

It is stated in appellees' brief, at the top of page 23, that the sale of the Sheridan was made a condition precedent by appellants to the sale of the Ella and Missing Link. We challenge that statement. It is not supported by the record.

At the end of page 36, and pages 37 and 38 of appellees' brief, considerable is said about the challenge that was made to us, to send a disinterested person as an umpire, to go into the mine and determine certain facts to control the Court. We have addressed ourselves to that proposition in our opening brief at pages 108 to 116, and do not feel called upon to say anything additional except that the course suggested by counsel for appellees is unknown to practice, either on the law or equity side of the Court. What right has the Court, or one of the parties, to select someone whose testimony shall control the Court, to the exclusion of other witnesses, thus usurping the very function of the Court? It is the duty of the Court, after having heard all the evi-

dence, to decide the facts, and the fact that the Court appoints one man to go and make an investigation of a fact should certainly give no greater weight to his testimony, than that given to the testimony of any other honest witness.

At the latter end of page 39 of appellees' brief they charge the appellants with bad faith, because of their failure to bring in evidence concerning the 600 and 800 foot levels. We are fearful that had we brought in evidence upon those matters we would again have been charged with bad faith in encumbering the record with a lot of irrelevant and immaterial matter, as we have been in some other respects.

At page 46, appellees criticise us for having spread upon the transcript a second time, our Exhibit No. 37, at page 1232, volume IV of the Transcript, being the opinion of this Court in the case of Kennedy J. Hanley vs. Charles Sweeney et al. We apologize both to the Court and to counsel for this. It was an error of the stenographer, and made without our knowledge, but when once in the record could not, by any practice that we are familiar with, be eliminated. There was certainly no purpose in putting it in twice.

The remainder of the testimony that was put in upon our part was put in because we believed it to be material. Some of it, perhaps, was not absolutely necessary, but all tending, as we thought and still think, to elicit some phase or feature of the case. We do not deem it necessary to explain in detail the purpose or effect of each piece of testimony.

At the latter end of page 50 and page 51, we are criticised, unjustly, we think. We cannot remain silent when

our good faith is questioned, and when we are charged with a violation of our duty as members of this court. The thought of having been disrespectful either to the Circuit Judge, or discourteous to any of the parties, never was suggested to us at the time of writing the brief, and such was furthest from our purpose. Since reading the criticism made by the other side, we have been impressed for the first time that the language employed by us might possibly be tortured into what is claimed for it in the brief of appellees. We therefore, at this time, want to disclaim to the Court any purpose to be discourteous to the parties, or disrespectful to the Circuit Judge, or the Circuit Court, or this Court, and if we thought the criticism just, and if we had intended what it is claimed the language employed means, we would lose no time in retracting and apologizing, but we earnestly insist that the charge of "abuse," "innuendo," and "harsh criticism" is entirely unjustified. In each instance we have endeavored to support what we have had to say about the subject, by reference to the record.

At page 35 of their brief, appellees say: "The plaintiffs have called to their assistance Joseph Macdonald, who, in the most unblushing manner testifies that he was voluntarily a party to a scheme to defraud the plaintiffs. * * * He admits thereby that he was willing to enter into a scheme to defraud his neighbor, or persons for whom he pretended personal friendship, at the instance of his employer." The record does not warrant that statement at all. The most that can be contended for by the appellees is, that Mr. Macdonald, in the employ of Mr. Sweeney, did not, while he was in his employ, advise Mr. Clark that he was being defrauded. And we

submit that one would not feel called upon to proclaim from the housetops the fact that his employer was perpetrating frauds right and left, but when required by legal process to testify, upon what principle of law or morals could he or should he claim to be exempt from giving the facts? It is in evidence that Mr. Macdonald quit the employment of appellees and that he refused further employment from them. We might, and could with much reason, argue from this that it was due to the fact that he would not, after discovering the true character of Mr. Sweeney, have any further business connections with him.

At pages 48 and 49 of appellees' brief, we find the following: "From the record and the testimony in this case, it appears that while Patrick Clark was the general manager and representative of the Coeur D'Alene Silver Lead Mining Company, a corporation having its principal place of business at Butte, Montana, and being represented in Idaho only, by Patrick Clark, and owning the Poorman Mine, in adjusting its lines on the east end, found or created a fraction of ground between the Poorman and the O'Neill claims. This fraction was located as the Ella and Missing Link claims. * * * It appears that while Patrick Clark and James Harvey were occupying positions in the employ of the company, taking advantage of the development upon the Poorman claim, and of the facilities which said development offered for the working of the two fractions claimed by them, they drove the 600 and 800 foot levels, *at the expense of their employer* from the Poorman mine, into and practically through these fractions, and with the aid of the machinery, and taking advantage of the investment

of the company, they extracted $16,524.78 net value in ores from these fractions, and divided it between themselves." * * * We absolutely refuse to be drawn into the trial or discussion of collateral issues, having absolutely no bearing upon the issues in this case. We are not disposed to dodge or avoid any legitimate issue thrust upon us, either at this time or at any time, but we would feel that we had lost the respect of the Court and been recreant to our duty as counsel, if we allowed ourselves to be drawn from the issues properly raised by the pleadings, to some collateral matter having no bearing upon the case. In addition to that, the statements made are absolutely untrue, *and are not supported by the record.* The only evidence in the record upon the subject, or squinting at it even, was drawn from Mr. Patrick Clark, one of the appellants, upon a cross-examination, and it is found at pages 548 and 549, volume II of the Transcript. It is as follows: "Q. What royalty did you receive? A. I cannot remember. *They were allowed so much for mining and concentrating,* etc., and what was left over that we received, which was the amount that was there; that is my recollection." And at page 561, volume II of the Transcript, the testimony of the same witness is the following: "Redirect Examination by Mr. Stoll. Q. You made some statements, or a statement rather, about some of those footings being the net value realized from these ores. Did I understand you correctly? A. At the smelter. Q. What was the *net value* realized by the owners? A. *I do not remember what it was.* Mr. Heyburn. He has deducted the *freight and the treatment charges, Mr. Stoll.* A. Yes, those are the net results at the smelter. (By Mr. Heyburn.) Q. That is what you got your check for? A. Yes, sir."

That is all the testimony there is in the record upon this proposition. It will be noted that Mr. Heyburn emphasized what he was attempting to draw from the witness by his statement to counsel, viz.: "*He has deducted the freight and the treatment charges, Mr. Stoll.*" Anyone at all familiar with mining will understand that there is a marked distinction between smelter returns and the net value. From the smelter returns, of course, must be deducted the cost of mining.

About the middle of page 49 of appellees' brief, they use the following language: "It is conceded by both sides that except at great expense, this fraction of ground can only be worked in connection with the Poorman Mine." That is absolutely foreign to the issue in this case, and we will not litigate it here. We had a right to hold our property and let the lead and silver sleep forever in the hillside, if we wanted to. It did not lie in the mouth of an intending purchaser to put the price upon it that he saw fit, because, *in his opinion, we could not work it except through his mines.* It takes two to make a contract. Here, again, is raised the question of value, and again we see the materiality of the testimony of Mr. Rice, Mr. Allen and Mr. Justus, as we have heretofore contended, at pages 61 and 62 of our opening brief. It will be remembered that the Circuit Judge held that while Mr. Sweeney was contradicted by these witnesses, the contradictions were upon immaterial matters.

At page 50 of their brief, appellees state: "Clark and Kingsbury made a secret arrangement to sell out their stock in the old company to Culbertson, unknown to their fellow stockholders, quite in keeping with their former plan of working their individual property at the

expense of the stockholders of the company they represented." They cite page 238 of the record in support of this proposition. We respectfully ask the Court to examine that page of the evidence, and we assert with confidence that the charge made is not borne out by the record. Is it going to be seriously urged that it is unlawful for owners of stock in a corporation to sell their holdings, without getting permission from the remainder of the shareholders, and that doing so is such conduct as prohibits parties from maintaining suits in equity to recover property fraudulently procured from them? If so, appellees establish a pretty high standard of conduct.

A rather energetic, but we think a very labored, effort was made in the brief of appellees to establish the fact that we were in error in our opening brief, in attempting to show that a survey had been made of the Ella and Missing Link, prior to the 13th of October, 1899, the date of the purchase. (See pages 63, to and including 87, of Appellants' Opening Brief.) We apologize to the Court for adding anything to the argument there made, but a few additional thoughts have suggested themselves, which we think of importance:

1. It must be noted that drill hole No. 3 was run absolutely parallel with the Ella west line. (See Map, Defendants' Exhibit No. 14, Section A, page 1294, volume IV, Trans.) Is this a guess, an accident, or a survey?

2. At page 325, volume I of the Transcript, the report written by Mr. Culbertson, uses this language at the latter end of the page: "Reference is made to the *longitudinal map* accompanying this report, showing in detail the ore stoped out, and the reserve now in sight." At the latter end of page 326, the report again uses this lan-

guage: "Reference is made to the *longitudinal map* accompanying this report, showing in detail the small quantity of ore stoped from this level."

3. On the question of the "Progress Map" referred to in our opening brief at pages 74 and 75, we want to call the Court's attention to page 709, volume II of the Transcript, testimony of W. Gus Smith, as follows:

"Q. What is the purpose of a progress map? A It is a *vertical, longitudinal section,* showing where the stopes are located, where the levels are located vertically, one above another.

"Q. What is the purpose of the map? A. It is to show what is stoped out during each month in the different stopes, and what is driven on the different levels.

"Q. Does it show the date and the number of feet that have been run in a given drift or stope, on a certain date, on each date, or practically so? A. During certain periods.

"Q. And does it show the width of the vein? A. It does not.

"Q. The character of the ore? A. It does not.

"Q. Then what does it show? A. It shows the *longitudinal* sections.

"Q. With the development? A. Yes, sir, it shows the vein; if a vein is a foot wide or fifty feet wide, it would appear just the same.

"Q. It shows the progress of the work, does it? A. Yes.

"Q. Did any officer of the company ever suggest to you that the work of McCormick was incorrect, or that they thought it might possibly be incorrect, and ask you to check it up? A. They did not."

At page 713, volume II of the Transcript, the same witness testified:

"Q. Mr. Smith, state whether or not it is a fact that when you made these maps and the progress map, you made a resurvey of all the workings of the mine, into which you could get. A. I did.

"Q. State whether or not you made your map from your actual survey? A. I did, for that portion of the mine.

"Q. Of which you made the resurvey? A. Yes, sir, on all the portion of the mine that was accessible, I made a complete survey and paid no attention whatever to the old maps for those portions. It was only the portions that were inaccessible.

"Q. Mr. Smith, what occasion, or would you have any occasion to make a progress map of inaccessible portions of the mine? A. None whatever.

"Q. Then your progress map was made from an actual survey of yours, was it? A. The portion I made was of course made from an actual survey.

"Q. I say, the live portion of the map? A. Yes, sir, showing the progress since I made the first survey, as well as showing what was done, and accessible at that time."

It is significant that whenever the appellees desired to establish something concerning the mine with their testimony, they had a ready reference to a map, and proved it with a map, but whenever something transpired with reference to operations within the Ella and Missing Link ground, the immediate announcement was made that they did not know where they were, and that they had no maps. For instance, at page 228, volume I of the Transcript, Mr. Culbertson testified:

"Q. Did the new company, the Buffalo Hump, keep a progress map? A. Later on they did.

"Q. What do you mean by later on—when did they start? A. Well, I think the first map was got up in September sometime.

"Q. September, 1899? A. In 1899."

At page 269, Mr. Culbertson testified that he got the maps out and showed them to Mr. Sweeney, on the 12th or 14th of June.

"That was the time he [Sweeney] said he would buy the Ella and Missing Link? A. That was the time the subject first came up."

And so, all through the record, innumerable references are made to maps, until we approach the Ella lines, at which time maps are lost.

Respectfully submitted,

STOLL & MacDONALD,

W. J. GORDON,

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Solicitors for Appellants.

Service admitted copy within this

Oct. 10. 1902

W. B. Hughes

Solicitor for appellant